IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 3465 OF 2003

IN

SUIT NO. 3687 OF 2003

M/s. Manjunath Poly Products ...Plaintiffs.
vs.
Lord Krishna Bank ltd and anr. ...Defendants.

N.C. Mehta i/by. Mehta and Co.

for the plaintiffs.

None for the defendants.

CORAM: S.U. KAMDAR, J.

DATE : 2nd March, 2006.

P.C. :

1. By the present Notice of motion the plaintiffs are seeking injunction against the defendant no.1 restraining them from making any payment under the bank guarantee bearing no.BG/3/02 dated 20.6.2002. Some of the material

facts of the present case are as under.

2. Pursuant to the tender dated 1.6.2001 a Rate Contract bearing no. 65 of 2002-2003 was granted by the defendant no. 2 to the plaintiffs for the purchase of Presured Trade Rubber, Bonding Gum and Black Vulkanising Solution for a period of one year from 14.6.2002 to 13.6.2003 on the terms and conditions set out under the said contract.

3. Under Condition 15 of the said contract the plaintiffs were required to give a security deposit of Rs.5 lacs in the form of a bank guarantee on a nationalised bank.

4. In pursuance of the said contract the plaintiffs furnished the bank guarantee being Guarantee No. BG3/2002 dated 20.6.2002 for sum of Rs.5 lacs which was valid upto 20.12.2003. The said bank guarantee has been given by the defendant no.1 bank. The said bank guarantee was in consideration for of any loss which may be

suffered by the defendant no.2 inrespect of the said contract upto Rs.5 lacs.

5. It is the case of the plaintiffs that pursuant to the said contract the plaintiffs have received purchase orders from various divisions of defendant no.2 within the State of Maharashtra and the plaintiffs supplied to the defendants goods from time to time as per the specification in the said purchase order at the contractual rate. It is the case of the plaintiffs that the defendant no.2 who is a Controller of various divisions made/raised various claim against the plaintiffs and issued letters/notices for payment of various amount towards the Laboratory Test Charges, penalty, material costs, damages, short fall guarantee Kms./performance etc and forwarded a claim statement for the same.

6. The defendant no.2 demanded therein from the plaintiffs a sum of Rs.4,29,339.28/- towards their claim. In view of the fact that the plaintiffs did not make the payment the defendant

no.2 has invoked the said bank guarantee by making a demand on the defendant no.1 bank. The defendant no.1 bank has in turn by letter dated 28.10.2003 informed the plaintiff that the defendant no.2 has invoked the said bank guarantee and thus demanded the payment thereunder from the plaintiffs.

6. In pursuance of the said letter the plaintiffs have filed the present suit seeking an interim relief of restraining the defendants from encashing the said bank guarantee. The only ground which is sought to be raised in the present suit for claiming injunction pertains to declaration that the invocation of the bank guarantee by the defendant no.2 is arbitrary and void and the same is not in terms of the said bank guarantee. Thus it is claimed that injunction should be granted to the plaintiffs restraining the defendants from enforcing the bank guarantee.

7. In so far as the bank guarantee is

concerned the law is well settled that unless a case is made out given of fraud or special equity or that the invocation of a guarantee is not in accordance with the terms of the bank guarantee no injunction can be granted. However learned counsel for the plaintiff has contended that in the present case bank guarantee is not invoked in accordance with the terms and conditions thereof because according to him it requires that defendant no.2 should make claim against the plaintiff for damages before invocation thereof. The relevant portion of the bank guarantee which has been relied upon by the plaintiff thereof reads as under :

> ". in the event of your making any claim whatsoever against M/s. Manjunath Poly Products irrespective of the fact whether M/s. Manjunath Poly Products admit or deny any such claim."

8. Learned counsel for the plaintiff has contended that the defendant no.2 did not make any claim whatsoever against the plaintiff for

the claim for damages and therefore he contended that invocation of bank guarantee is not in accordance with the terms of the bank guarantee. He further admitted that no case of fraud or special equity is either pleaded or made out by the plaintiff in the present suit. Learned counsel for the plaintiff has further relied upon the judgment of the Single Judge in the case of **Crest Communications Ltd vs. State Bank of India reported in 2000(1) ALL MR 598 and** has contended that in the light of the aforesaid judgment the invocation is bad in law.

9. Firstly in so far as the aforesaid judgment is concerned the same has no application to the facts of the present case,. In that judgment one of the condition in the bank guarantee itself was that before invocation thereof the person who has given the bank guarantee should be declared as a defaulter under the contract. The relevant portion of the said judgment reads as under :

> "13. In the present case also though, the 2nd defendant has made demand to 1st defendant for the invocation of bank guarantee, the said demand prima-facie is not in accord with the terms and conditions of the performance guarantee in as much as there is no declaration by the 2nd defendant that the plaintiff is defaulter under the contract. Moreover there could not have been such declaration by 2nd defendant since the 2nd defendant accepted the supplies made by the plaintiff under purchase order without demur to its satisfaction.

10. In the light of the facts of the aforesaid case in para 13 the court has come to the conclusion that invocation of bank guarantee is not in accordance with the terms and conditions of the performance guarantee because there is no declaration by the 2nd defendant that the plaintiff is the defaulter and therefore injunction was granted. In the present case the contention sought by the learned counsel for the plaintiff that there was no demand made of damages by the defendant no.2 on the plaintiffs is totally false in as much as in para 6 of the plaint itself it has been admitted that there are

various demands made by the defendant no.2 for seeking recovery for claim of damages and accordingly demanded from the plaintiffs a claim of was Rs.4,29,333.28/-.

11. In the light of the averments made the contention of the plaintiff that there was no demand by the defendant no.2 as required under the bank guarantee cannot be accepted and thus should be rejected. However on pointing out para 6 of the plaint now the learned counsel for the plaintiffs contends that the damages claim is only to the extent of Rs.4,29,339.28./- where the bank guarantee sought to be invoked is of Rs.5 lacs. I am afraid that it is not permissible for this court to go into the actual computation of damages for the purpose of grant of injunction as sought by the plaintiffs herein. Thus I do not find any substance in the said contention and reject the same.

12. Learned counsel for the plaintiffs apply for stay of the order. Stay granted for two

weeks.

sd/-

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